1993

State of Utah v. Jack D. Brocksmith : Brief of Appellant

Utah Court of Appeals

Joanne C. Slotnick; Assistant Attorney General; Attorney for Appellee.
Herm Olsen; Hillyard, Anderson, & Olsen; Attorney for Appellant.
Herm Olsen #2463 Hillyard, Anderson & Olsen 175 East 100 North Logan, UT 84321 Telephone (801) 752-2610 Attorney for Defendant and Appellant Jack D. Brocksmith
Joanne C. Slotnick # Assistant Attorney General 236 State Capitol Building Salt Lake City, UT 84114

IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	)	
Plaintiff/Appellee,	)	Case No. 930146-CA
vs.	)	First District Court
JACK D. BROCKSMITH,	)	No. 921000051
Defendant/Appellant.	)	Priority No. 2

APPELLANT JACK BROCKSMITH'S BRIEF

Appeal from an order of the
First Judicial District Court,
Cache County, State of Utah
The Honorable Gordon J. Low Presiding

Herm Olsen #2463
Hillyard, Anderson & Olsen
175 East 100 North
Logan, UT 84321
Telephone (801) 752-2610

Attorney for Defendant and
Appellant Jack D. Brocksmith

Joanne C. Slotnick #
Assistant Attorney General
236 State Capitol Building
Salt Lake City, UT 84114

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Joanne C. Slotnick #
Assistant Attorney General
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Salt Lake City, UT 84114

LIST OF ALL PARTIES IN THE DISTRICT COURT

The following parties appeared in the proceeding in the District Court:

1. The State of Utah, Plaintiff, represented by the Cache County Attorney's Office, Gary McKean and by Assistant Attorney General Joanne Slotnik.

2. Defendant Jack D. Brocksmith.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases Cited

Cases Cited
Continued

Constitutional Provisions, Statutes, Ordinances, Rules, and Regulations

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JURISDICTION OF THE COURT

The Utah Court of Appeals has jurisdiction over this matter pursuant to §§ 78-2(a)-1 et seq. Utah Code Ann. (1953 as amended), Utah Rules of Appellate Procedure 3, and Article VIII § 1 et seq of the Utah Constitution. Defendant/Appellant entered a plea of guilty to six counts of communications fraud on January 14, 1993. Defendant/Appellant filed a Motion to Withdraw Plea on or about February 8, 1993, which motion was denied by the Court on or about March 9, 1993 and March 24, 1993. (See Exhibits 1, 2 and 3 attached hereto.) Notice of appeal was mailed pro se on or about March 4, 1993. (See Exhibit 4 attached hereto.)

NATURE OF PROCEEDINGS

This appeal is from the District Court's denial of Appellant's Motion to Withdraw Plea in the First Judicial District Court of Cache County, State of Utah, on March 9 and March 24, 1993. Defendant/Appellant is hereafter referred to as Brocksmith.

ISSUES PRESENTED FOR REVIEW

Whether the trial court erred by refusing to allow Appellant to withdraw his plea of guilty to charges entered just days previously, after the State had violated § 77-29-5 et seq. Utah Code Ann., after the State had violated Defendant's rights to a speedy trial, after the State had denied access to the courts by the Defendant, and after the State had violated numerous rules and laws amounting to a denial of equal protection of the laws and due process under both the Utah and United States Constitutions.

STATEMENT OF THE CASE

A. Background and Statement of Facts.

1. On January 9, 1989, Detective Jim Williamson of the Logan City Police Department appeared before the Honorable Clint Judkins, Judge of the Circuit Court in the First Judicial District for Cache County, Utah, and swore to an affidavit, requesting a search warrant and a warrant of arrest for the Defendant. A search was conducted on January 9, 1989, and a return made on January 12, 1989. (See Record, pp. 215 and 622.)

2. On June 28, 1989, an arrest warrant was issued by the Fourteenth Circuit Court of Mercer County, Illinois, on felony charges for the Defendant (Case No. 89-CF-54), charging theft. (Referred on Record, p. 53.)

3. Defendant Brocksmith was arrested in Utah on July 11, 1989, with a petition for the issuance of a warrant of arrest for Defendant as a fugitive from justice pursuant to the Illinois warrant of arrest being filed on July 13, 1989, together with an

accompanying affidavit in the Cache County Circuit Court case (No. 891000741) in the First Circuit Court in and for Cache County, Utah.

4. On July 13, 1989, a warrant of commitment pending the issuance of a governor's warrant was issued in the First Judicial Circuit Court and on July 17, 1989, a commitment was issued by the First Circuit Court commanding any peace officer to take the Defendant into custody and to hold him pending an order of release or the posting of bail in the amount of $200,000.00.

5. The Defendant was incarcerated in the Cache County Jail pursuant to the Illinois warrant of arrest on July 11, 1989, and was held thereafter until October 5, 1989, pursuant to the warrant of commitment pending governor's warrant and the commitment issued by the First Circuit Court. On October 5, 1989, the State of Utah filed an information and an affidavit of probable cause against the Defendant in Circuit Court Case No. 892001140 in the First Circuit Court for Cache County, charging eight counts of communications fraud as second degree felonies, ten counts of theft by deception as second degree felonies, and one count of theft by deception as a third degree felony. (See Record, p. 216 and referenced p. 165.)

6. On October 10, 1989, the Defendant appeared in the Circuit Court with his attorney, Donald C. Hughes, Jr., and waived preliminary hearing. (See Record, p. 216.) On October 11, 1989, the Defendant was bound over for trial in the District Court of the First Judicial District of the State of Utah in and for the County of Cache. (See Record, referenced pp. 165 and 216.)

7. On October 19, 1989, Mr. Brocksmith appeared in District Court with his attorney and entered a plea of not guilty and demanded a jury trial. The Defendant did not waive his right to a speedy trial nor his right to have a trial within 30 days as provided by § 77-1-6(1)(h) Utah Code Ann. (1953), with Defendant remaining incarcerated because of inability of post bail. (See Record, p. 216 and referenced p. 165.)

8. The State of Utah claims that on October 25, 1989, a motion to dismiss the information was mailed to the Defendant's attorney, Donald C. Hughes, Jr., although Mr. Hughes by affidavit denies receiving a copy of the motion to dismiss. (See Record, p. 512.)

9. The District Court file contains a letter from Brocksmith to the Honorable Gordon Low, Judge of the District Court, dated October 31, 1989, in the form of a mailgram. In the mailgram Defendant stated that he was unable to reach his attorney, did not know the status of his case, and asked: "Where is my right to a speedy trial?" The prosecutor did not receive a copy of the mailgram. (See Record, p. 305.)

10. For reasons that do not appear in the record, and in the absence of the Defendant and his attorney, the District Court signed an order dismissing the information without prejudice, but did not give any reason for the dismissal in its order contrary to the provisions of § 77-2-4 Utah Code Ann. (1953), and Rule 25(c) of the Utah Rules of Criminal Procedure. (See Record, p. 306.) The ex parte order dismissed Case No. 891000111 and on the same date the Defendant was transferred to the State of Illinois

Illinois for prosecution on state and federal charges. Defendant has testified (see Record, p. 513) that he was not informed of the State's motion to dismiss by his attorney or directly by the State of Utah.

11. Defendant Brocksmith's mailgram requesting a speedy trial was not filed until November 8, 1989, and the Court took no action on his request for reconsideration of the Court's order.

12. On December 21, 1989, the State of Utah filed virtually identical charges which it had moved to dismiss just six weeks earlier, based upon an affidavit of probable cause for information. (See Record, p. 187-208.) The State did not send a copy of the newly filed information to the Defendant, although it did send a copy to Attorney Donald C. Hughes, Jr. and Attorney Robert Gutke. At no time did the State of Utah notify the District Court that it was refiling the charges in the Logan Circuit Court (No. 891001462). That new information charged four counts of communications fraud as first degree felonies, ten counts of theft by deception as second degree felonies, and one count of theft by deception, a third degree felony.

13. On February 7, 1990, the Defendant requested disposition of the charges against him in Utah pursuant to the Interstate Detainer Act to which Utah is a party under the provisions of § 77-29-5 Utah Code Ann. (1953). (See Record, p. 396.) The application for disposition was filed in the District Court of Cache County on March 1, 1990, and a copy of which was received by the Cache County Attorney. (See Record, pp. 181, 182 and 397.) The application was prompted by notice from the chief

jailer in Mercer County, Illinois, that new charges had been filed against him by the State of Utah. The Cache County Attorney's Office acknowledges receipt of the application for disposition on March 12, 1990.

14. Without notice to the Defendant, the Cache County Attorney appeared before the District Court of the First Judicial District on March 26, 1990, but did not inform the District Court that virtually identical charges which had been previously dismissed by the District Court had been refiled in the Circuit Court. Failure by the County Attorney to notify the District Court of the true nature of pending charges precluded the District Court from filing Brocksmith's application for disposition under IAD with the Circuit Court. Instead, the County Attorney asked the District Court to not modify its order of dismissal of November 6, 1989, which had dismissed the previous charges. The minute entry in the District Court originally stated that the cases are to remain the same-- "dismissed ... until charges in Illinois are determined." No formal order was prepared and no notice was given to the Defendant. On April 2, 1990, Assistant Utah Attorney General C.C. Horton II wrote a letter to the Mercer County Sheriff and stated that: "... Mr. Brocksmith's request is premature at this point." (See Record, pp. 179 and 394-95.)

15. On April 3, 1990, Ron E. Miller, Special Agent for the Utah Attorney General's Office, sent a certified felony warrant of arrest and a letter to the Mercer County Sheriff which requested that Mercer County "... hold Brocksmith for Utah

authorities when Illinois state and federal criminal proceedings are finished." (See Record, p. 519.)

16. On June 5, 1990, the Defendant sent his first of three requests for a public defender to the First Judicial Circuit Court in Case No. 891001462. This request was filed in the Circuit Court where charges were then pending. No action was taken on the request. (See Record, p. 183.)

17. On July 25, 1990, the charges in Illinois were determined and the Defendant was sentenced and given credit for the time previously served. Even though the 180-day period mandated by § 77-29 et seq. Utah Code Ann. would expire on September 1, 1990, the State of Utah took no action to have the Defendant brought to Utah for trial. Defendant was released from the Mercer County Jail on July 31, 1990, into the custody of federal authorities.

18. On August 2, 1990, the Utah Attorney General's Office sent a certified copy of a felony warrant of arrest and a letter to James Fyke, United States Marshal in Springfield, Illinois, which requested that "... you hold Brocksmith for Utah authorities when Illinois federal criminal proceedings are finished." (See Record, pp. 166 and 399.) This letter was received by the federal marshal on August 10, 1990.

19. On August 9, 1990, Defendant was released from federal custody on an appearance bond and was free on bond until January 31, 1991, the date Defendant was convicted of federal mail fraud charges.

20. On March 16, 1991, the Defendant, acting pro se, filed a motion to dismiss all charges in the District Court of the First Judicial District. (See Record, referenced p. 165.) The District Court took no action on the Defendant's motion, nor did the District Court inform the Defendant that charges were pending in the Circuit Court and that his motion should be filed with that Court. On that same date, the Defendant made his second written request for the assistance of counsel. (See Record, referenced p. 165.) Defendant requested counsel to assist him with his motion to dismiss. Defendant's motion was never entertained by the Court as the Court was under the erroneous impression that no charges were then pending against the Defendant because the County Attorney had failed to notify the District Court of the pending charges in Circuit Court.

21. On April 23, 1991, the Defendant requested a decision on his motion and on April 30, 1991, Defendant again requested that counsel be appointed because of his indigent status. No action was taken on the Defendant's requests. The letter sent by Mr. Brocksmith also represents three phone calls to the District Court inquiring as to the disposition of his motion to dismiss. Even though the Cache County Attorney received a copy of the motion to dismiss, no response was forthcoming from either the Court or the County Attorney. Having been unable to obtain counsel or a hearing on his request for speedy trial in the State Courts, Defendant filed a writ of habeas corpus in the United States District Court, District of Utah, Central Division. That request was denied because the Federal Court, relying on the

March 26, 1990 minute entry filed in the Cache County District Court, found that no charges were pending against the Defendant in the State of Utah. (See Record, referenced p. 165.) Because the County Attorney failed to notify the Federal District Court of the pending Circuit Court charges, the Federal Court found that Defendant had not exhausted his state remedies.

22. The Defendant appealed the denial of the habeas action but later withdrew the appeal as he was under the impression that charges against him had, in fact, been dismissed.

23. On May 13, 1991, Defendant was sentenced on federal charges and incarcerated temporarily in the Chicago Metro Correction Center. On June 4, 1991, Defendant was permanently incarcerated at the Sandstone Federal Correctional Institution in Sandstone, Minnesota.

24. On June 26, 1991, the Cache County Attorney lodged a third detainer against the Defendant, under the Interstate Agreement on Detainers Act, with the Sandstone Federal Correctional Institution, Sandstone, Minnesota.

25. On June 27, 1991, the State of Utah filed a request for temporary custody of the Defendant. The request for temporary custody was not approved, recorded and transmitted by the Circuit Court Judge having jurisdiction over the information which formed the basis for the detainer lodged against the Defendant, as required by Article IV, subsection (a) of the Interstate Agreement. (See Record, p. 330.)

26. Defendant requested and was given 30 days in which to challenge his transfer to Utah based upon violation of his rights

under the Interstate Agreement on Detainers. That 30-day waiting period expired on August 24, 1991. On July 3, 1991, Defendant sent a third written request for counsel to the First Judicial District Court. (See Record, referenced p. 165.) The request was mailed to the Utah Attorney General's Office and the Cache County Attorney. Defendant received no response from this request.

27. On July 7, 1991, Defendant wrote to the Cache County Attorney and indicated that he was contesting his transfer to Utah as being a violation of his rights under the Interstate Agreement on Detainers. (See Record, p. 332.) Defendant did not renew his request for final disposition of the Utah charges after he was incarcerated at the Sandstone Federal Correctional Institute, under the belief that his previous request, even if it had been premature, was triggered upon his permanent placement.

28. On August 26, 1991, federal authorities at Sandstone offered to deliver temporary custody of the Defendant to Utah authorities (see Record, p. 173) and on February 20, 1992, the Defendant was brought before the Logan Circuit Court. For the first time since he had initially requested counsel on April 30, 1991, he was appointed counsel to defend him. This was approximately 176 days following the federal authorities' offer of temporary custody.

29. On February 24, 1992, the Defendant, through his court-appointed counsel, filed a motion to dismiss based upon violation of Defendant's constitutional right to speedy trial, as well as

violation of the terms and provisions of the Interstate Agreement on Detainers. (See Record, p. 105.)

30. On March 17, 1992, the State filed a motion to quash the Defendant's motion to dismiss, alleging that magistrates in a felony case do not have jurisdiction to entertain a motion to dismiss for violation of speedy trial. On April 2, 1992, the Honorable Clint S. Judkins, acting as a magistrate, entered an order granting the State's motion and quashing the Defendant's motion to dismiss. (See Record, p. 31.)

31. On April 27, 1992, a preliminary hearing was conducted before the Honorable Burton H. Harris, acting as magistrate, and the Defendant was bound over to the District Court on one first degree felony count of communications fraud, three second degree felony counts of communications fraud, ten second degree felony counts of theft by deception, and one third degree felony count of theft by deception.

32. Defendant filed a motion to dismiss in District Court on May 1, 1992. Defendant was arraigned on May 11, 1992. On August 19, 1992, the Defendant filed a motion for declaration of invalidity, based upon the State's failure to obtain court approval prior to transferring the Defendant to the State of Utah. (See Record, p. 428.) The Court consolidated the motions and a hearing was held thereon on September 24, 1992. On October 5, 1992, the Court denied Defendant's motion to dismiss and his motion for declaration of invalidity. (See Record, pp. 568 and 591.)

33. Defendant pled guilty to six counts of communications fraud on January 14, 1993, and thereafter filed a motion to withdraw plea, which motion was denied, and this appeal followed.

ARGUMENT

I

THE COURT ERRED BY NOT ALLOWING APPELLANT BROCKSMITH TO WITHDRAW HIS PLEA OF GUILTY INASMUCH AS THE STATE HAD VIOLATED THE INTERSTATE AGREEMENT ON DETAINERS.

A. The State Violated the 180-Day Trial Limit.

Utah is a party to the Interstate Agreement on Detainers (IAD) as adopted by U.C.A. § 77-29-1 et. seq. (1953). Article III of the (IAD) allows an imprisoned individual, against whom a detainer has been lodged, to make a request for final disposition of all charges pending in another state by placing a written demand with the official having custody of him or her:

> (a) Whenever a person has entered upon a term of imprisonment in a penal or correctional institution of a party state, and whenever during the continuation of the term of the imprisonment there is pending in any other party state any untried indictment, information or complaint on the basis of which a detainer has been lodged against the prisoner, he shall be brought to trial within 180 days after he shall have caused to be delivered to the prosecuting officer and the appropriate court of the prosecuting officer's jurisdiction written notice of the place of his imprisonment and his request for final disposition to be made of the indictment, information or complaint; (See U.C.A. § 77-29-5.)

Article III specifies that the demand for final notice be given to the official having custody of the prisoner:

> (b) Written notice and request for final disposition referred to in paragraph (a) hereof shall be given or sent by the prisoner to the warden, commissioner or corrections or other

> official having custody of him, who shall promptly forward it together with the certificate of the appropriate prosecuting official and court by registered or certified mail, return receipt requested.

Significantly, the statue further requires that:

> (d) Any request for final disposition made by a prisoner pursuant to paragraph (a) hereof shall operate as a request for final disposition of all untried indictments, informations or complaints on the basis of which detainers have been lodged against the prisoner from the state to whose prosecuting official the request for disposition is specifically directed.

Id. (emphasis added).

Accordingly, "any request for final disposition" that a prisoner makes should be treated as a demand on the receiving state to comply with the terms of IAD. Indeed, the legislature has placed only this IAD burden on the prisoner, that is, to send a request for disposition. His sending of that request shifts the burden to the prison officials who have custody over him to prepare and send the forms to the receiving state. See Henager vs. State, 716 P.2d 669, 673 (Okla. Cr. 1986).

Defendant filed his original request for final disposition on February 7, 1990 with the Mercer County Sheriff who had custody over him. His request waived extradition and indicated his understanding that the sheriff was to send his request with the terms of his incarceration to prosecuting officials in Utah. Thus, Defendant's request itself complied with the notice requirements of the Interstate Agreement on Detainers. As noted by the court in Gibson v. Klevenhagen, 777 F.2d 1056 (5th Cir. 1985), the Court may be hard-pressed to conceive of a way in

which Defendant Brocksmith, acting as his own counsel, could have effected any better compliance with IAD. Id. at 1058. Defendant Brocksmith had no duty following his sending of his February 7, 1990 request for final disposition. His letter was a request for disposition. See Nash v. Jeffes, 739 F.2d 878 (3rd Cir. 1984), affirmed, in part, Carchman v. Nash, 473 U.S. 716, 105 S.Ct. 3401, 87 L.#d.2d 516 (1985).

But Defendant did more than file his original request for disposition. He also filed, on March 15, 1991, a motion to dismiss the charges pending against him in Utah. This motion was filed in the First District Court in Cache County, Utah, and operated as his second request for final disposition of the Utah charges. In United States v. Mauro, 436 U.S. 340, 98 S.C. 1834, 56 L.Ed.2d 329 (1978), the United States Supreme Court found that a defendant's Motion to Dismiss, which did not even mention the *Interstate Agreement on Detainers, was sufficient to put the* state on notice of defendant's claim under IAD:

> The record shows that from the time he was arrested [the defendant] persistently requested that he be given a speedy trial. After his trial date had been continued for the third time, he sought the dismissal of his indictment on the ground that the delay in bringing him to trial while the detainer remained lodged against him was causing him to be denied certain privileges at the state prison. We deem these activities on [the defendant's] part sufficient to put the Government and the District Court on notice of the substance of his claim.

Id. at 349-50.

Similarly, in Henager v. State, 716 P.2d 669 (Okla. Cr. 1986), the defendant filed a request for final disposition and

subsequently a Motion to Dismiss for violation of his speedy trial rights. The court found that the original request was ineffective, but with respect to the Motion to Dismiss, ruled that it served as adequate statutory notice to the state, thus triggering its IAD responsibilities. Id. at 673.

Defendant's motion was filed with the District Court and was received by the Cache County Attorney. Defendant's follow-up correspondence regarding his motion to dismiss was also received by the Court and the County Attorney. Accordingly, the Court and the State were on notice that the Defendant was requesting speedy disposition of all Utah charges. Simply put, Defendant had discharged his obligation to file his request for final disposition, the only request required of him under the IAD. Defendant Brocksmith had, in fact, made repeated speedy trial demands for trial to the District Court and to the County Attorney that indicted him. He had, therefore, exhausted all available State Court remedies for consideration of his speedy trial claims. See Gibson at 1058.

It should be noted that there is no requirement in the statute that the elements required under IAD be met in any particular order. Thus, even though Defendant filed his request for final disposition before a formal detainer was lodged against him, once the detainers were lodged and once Brocksmith began serving a "term of imprisonment," the State's responsibilities under the IAD ripened.

The sequencing for a prisoner's compliance with Article III seems to be as follows:

1. The person must have entered "upon a term of imprisonment."

2. There must be pending in the sister state an untried indictment, information or complaint.

3. There must be a detainer lodged by the State against the prisoner.

4. The prisoner must cause a written notice be given to both the prosecutor and the court of the jurisdiction which would prosecute him.

5. That request for disposition must notify the prosecutor and the Court of his place of imprisonment and accompanied by a certificate of the appropriate official having custody of the prisoner.

There is nothing in the Act which requires that the above-cited sequence must be in the order recited.

In the case before this Court, the sequence appears as follows:

1. In February or March of 1990, the Cache County Attorney received notice of the Defendant's request for disposition dated February 7, 1990. Said notice is on file in the District Court of Cache County, Utah (File No. 891000111), showing a filing date of March 1, 1990. The Cache County Attorney's Office acknowledges receipt of the application for disposition on March 12, 1990, and appeared in District Court on March 26, 1990, but failed to disclose to the District Court that it had refiled charges against the Defendant in the Circuit Court the previous December 21st.

2. The County Attorney apparently felt obligated to appear in District Court based on the notice received from the chief jailer in Mercer County, Illinois, that recognized new charges had been filed against Brocksmith by the State of Utah. The Cache County Attorney's Office acknowledges receipt of the application for disposition on March 12, 1990.

3. Detainers were filed by the State of Utah in the form of a certified felony warrant mailed by Special Agent for the Utah Attorney General's Office, Ron E. Miller, on or about April 3, 1990. That felony warrant was mailed to the Mercer County Sheriff in Illinois. A second detainer was filed by the Utah Attorney General's Office on August 3, 1990, wherein a certified copy of a felony warrant of arrest and a letter to James Fike, U.S. Marshal in Springfield, Illinois, was issued. The federal marshal received the detainer on August 10, 1990.

4. The term of imprisonment began on May 13, 1991, when Defendant was sentenced on federal charges and incarcerated at the Chicago Metro Corrections Center, and was thereafter permanently incarcerated at the Sandstone Federal Correctional Institution in Sandstone, Minnesota, on June 4, 1991.

There should be no dispute that the final piece of the puzzle to trigger IAD protections began on June 4, 1991. At that point, the State had 180 days to bring Mr. Brocksmith to trial.

Inasmuch as Mr. Brocksmith did not enter his plea of guilty until January 14, 1993, the State clearly violated its obligations under IAD.

On April 3, 1990, the Utah Attorney General's Office lodged a detainer with the Mercer County Sheriff's Office in Aledo, Illinois. By it's own admission, the Mercer County Sheriff's Office and the State of Illinois accepted this correspondence from the Utah Attorney General as a formal detainer lodged against Defendant Brocksmith. (See Record, p. 586.) On August 2, 1990, the Utah Attorney General's Office lodged a second detainer with the Federal Marshal in Springfield, Illinois. This detainer was received by the federal authorities on August 10, 1990. On June 26, 1991, the Cache County Attorney lodged a third detainer with the federal authorities at the Sandstone Federal Correctional Institution. Thus, at various times--before, after and during times when Mr. Brocksmith was incarcerated--the State was filing detainers for him to be held.

The United States Supreme Court in Carchman v. Nash, 473 U.S. 716, 105 S.C. 3401, 87 L.Ed.2d 516 (1985), has defined a detainer as follows:

> A detainer is a request filed by a criminal justice agency with the institution in which the prisoner is incarcerated, asking the institution either to hold the prisoner or the agency or to notify the agency when release of the prisoner is imminent.

Id. at 526. The multiple detainers filed against Brocksmith fit squarely within this definition.

Significantly, in the present case charges were filed on December 21, 1989, and an immediate arrest warrant was issued for Defendant Brocksmith. Because detainers are based on arrest warrants, see Dickerson v. Louisiana, 816 F.2d 220, 221-222 (5th

Cir. 1987), and because the charges against Mr. Brocksmith were relayed by correctional authorities in Utah to the authorities in Illinois, presumably through NCIC, Defendant Brocksmith was notified sometime in December 1989 of the charges pending in Utah. Because he had been advised of the charges pending in Utah, he filed his request for final disposition in February of 1990. An arrest warrant issued and Utah was on notice that Brocksmith had become aware of the Utah charges pending against him, and that he wanted them resolved. The State of Utah formalized their intent to have a detainer placed on Mr. Brocksmith on April 3, 1990. On that day the State sent formal notice to the State of Illinois that they wanted Defendant Brocksmith held pending the resolution of Illinois charges against him. The State cannot now argue that such a request does not constitute a detainer. As noted by the Court in U.S. v. Schrum, 504 F.Supp. 23 (affirmed, 638 F.2d 215 (10th Cir. 1981), prosecutors in receiving jurisdictions should think long and hard before filing the detaining requests such as Utah did in April 1990, in August 1990, and in June 1991. "If a [receiving jurisdiction] wishes to avoid raising questions under the act and is certain of the prisoner's continued incarceration ... it need only refrain from filing a detainer, relying instead upon [a writ of habeas corpus]." Id. at 26. In other words, the State of Utah should have avoided filing their various detaining requests with the State of Illinois if they did not intend to abide by the IAD.

To be sure, neither the State nor Defendant Brocksmith filed, respectively, their detainers or disposition requests in the order seemingly contemplated by the act. Interpreting these kinds of aberrant factual situations, the courts have generally sided with defendants against the state. Citing United States v. Hutchins, 489 F.Supp. 710, 714-15 (N.D. Ind. 1980), the Court in United States v. Reed, 910 F.2d 621 (9th Cir. 1990), ruled that the IAD would be triggered immediately upon the prisoner becoming incarcerated, even though the detainer and the request for disposition occurred before the term of imprisonment began. Id. at 714-15. As astutely noted by the court in Hutchins: "The agreement contemplated that ideally the prisoner involved will be serving a sentence when his custodian notifies him of a detainer and his rights under the agreement. The timing thus contemplated, however, is not essential and should not be strictly required in a technical fashion when to do so would undercut the purposes of the agreement." See Hutchins at 714. The court then observed: "Although Article III(a) mentions the above four factors in the order listed [in the statute], there is no explicit requirement that they accrue in any special sequence." Id. at 714.

In sum, when Defendant Brocksmith began serving his sentence at the Sandstone Correctional Facility on June 4, 1991, all requirements of the IAD were met and the State's responsibilities thereunder were triggered. The State had 180 days from June 4, 1991, to bring Defendant Brocksmith to trial. By failing to do so, the State violated the clear intent and specific requirement

of Article III(a) of the Act. Defendant Brocksmith has previously argued that the Act required the State to perform much sooner than June 1991. Indeed, when he made his request for final disposition in February 1990, he was already incarcerated, albeit as a pretrial detainee. Moreover, when Defendant Brocksmith was sentenced in Illinois in July 1990, he was given credit for the prior 379 days he had served in the Mercer County Jail. An argument could be made that Defendant was serving a "term of imprisonment" when both his request for final disposition and the State's initial attempt at a detainer were filed. But even putting those arguments aside, the very latest that all of the IAD requirements converge and trigger the 180-day trial clock is June 4, 1991. Accordingly, the State had until December 3, 1991 to bring Defendant to trial or suffer the consequences spelled out in the Act: "If trial is not had on any indictment, information or complaint contemplated [by the act] prior to the return of the prisoner to the original place of imprisonment, such indictment, information or complaint shall not be of any further force or effect, and the court shall enter an order dismissing the same with prejudice." (See Article III(d) Utah Code Ann. § 77-29-5.)

When did the State actually bring Brocksmith to trial? On January 14, 1993, 583 days after the indisputable entry upon a term of imprisonment, June 4, 1991. Utah missed the mark by 403 days, minus time which could be attributable to Mr. Brocksmith. Fundamental fairness in this case requires that the 180-day time limit commence running on June 4, 1991, the date on which

Brocksmith began serving his sentence in Minnesota. On that date, all provisions of the IAD had been complied with: Brocksmith was serving a term of imprisonment, a detainer had been lodged, Defendant had made requests for final disposition of his Utah charges, and the State had received the terms and conditions of Defendant's incarceration. As stated in United States v. Reed, supra, at page 25, the statute is to be "liberally construed to effect rapid disposal of outstanding detainers." The Court ruled that "when the government has failed to fulfill its obligations under the act, yet the prisoner has clearly attempted to get a speedy trial, courts have dismissed indictments not prosecuted within 180 days." Simply put, the State waited too long to bring Defendant to trial. They cannot now be heard to complain that all of the statute's requirements were not met or that they did not have sufficient time to bring Defendant to trial. Indeed, from February 1990--when Defendant made his first request for final disposition--until January 1993--when Defendant finally entered his guilty plea in the State of Utah--the State of Utah knew of Defendant Brocksmith's intent to have the State abide by the IAD and bring him to trial within 180 days. Even so, almost three years went by before Defendant was brought "to trial." Unquestionably, Defendant's rights under the IAD were violated and the State has no standing to bring or continue the charges against him.

B. The State Violated Article V(e) of the Interstate Agreement on Detainers.

Article V (e) of IAD requires: "At the earliest practicable time consonant with the purposes of this agreement, the prisoner shall be returned to the sending state."

The State circumvented the purpose and spirit of Article V (e) of IAD by failing to transport the Defendant in a timely manner after the offer of temporary custody had been provided by federal authorities in Minnesota on August 26, 1991. Notwithstanding the Defendant had repeatedly raised his request for a speedy trial and defended extradition on the basis of violation of his speedy trial rights, the State of Utah allowed in excess of five months to go by before returning Defendant to Utah for trial, violating the purpose and intent of Article IV of the IAD. In an analogous situation, the Supreme Court of Washington in State v. Peterson, 585 P.2d 66 (Wash. 1978), found that while speedy trial time limits do not begin to run until a previously "unavailable" defendant is present within the jurisdiction, the state must make a diligent effort to return a defendant to the prosecuting state for trial:

> Finally, under 3.3(f) the speedy trial time limits applicable to a defendant who is absent and thereby unavailable for trial do not run until the defendant is actually present. However, unavailability as established under this rule can be shown only if the prosecution demonstrates good faith and diligent efforts to obtain the availability of the defendant. ... We agree with that portion of State v. Hattori, 573 P.2d 829 (Wash. 1978), wherein the Court of Appeals states: A defendant cannot be considered 'unavailable' for purposes of Section 3.3(f), if his whereabouts are known and reasonable efforts are not taken to obtain his presence in the county wherein the

> charges are pending. If the state fails to exercise reasonable efforts in obtaining the defendant's presence, the time periods shall not accrue anew within the meaning of [Section] 3.3(f). In determining whether the state has acted reasonably, the time necessary for transporting the defendant back to this state and administrative delays caused by the foreign jurisdiction as well as whether the defendant waives extradition, are important factors to be considered.

Id. at 69 (emphasis added).

In the present case, Utah authorities were well aware of Brocksmith's location and had been aware during the entire pendency of the Illinois charges. Further, there were no administrative delays in the sending jurisdiction which would have prevented Defendant's return. The State of Illinois offered temporary custody of the Defendant on August 26, 1991. Thereafter, the State allowed 176 days to expire before even bringing the Defendant to Utah. On this basis alone, as expressed in Peterson, the delay in bringing Defendant Brocksmith to Utah itself should be sufficient to require dismissal of the charges against him.

C. The State Violated the 120-Day Speedy Trial Provision of the Interstate Agreement on Detainers.

Article IV (a) of the IAD provides:

> The appropriate officer ... shall be entitled to have a prisoner ... made available ... upon presentation of a written request for temporary custody ...;
>
> In respect to any proceedings made possible by this article, trial shall be commenced within one hundred twenty days of the arrival of the prisoner in the receiving state ... . (c)

Not only did the State wait 176 days before even bringing Defendant Brocksmith to Utah, once they got him here on February 19, 1992, the State then waited almost an entire year before bringing Defendant Brocksmith to trial. Under the IAD, the State has 120 days from the time a defendant arrives in the receiving jurisdiction to bring that defendant to trial. See Utah Code Ann. § 77-29-5 (IV)(c). As stated by the Utah Supreme Court in State v. Viles, 702 P.2d 1175 (Utah 1985), this 120-day time limitation is the legislatively expressed time limit for a constitutionally speedy trial in cases involving the IAD:

> [Under Article VI(a) of the Act] the running of [these] time periods shall be tolled whenever and for as long as the prisoner is unable to stand trial, as determined by the court.

Id. at 1176. The determinative phrase in this section is "unable to stand trial." As noted by the Sixth Circuit in U.S. v. Birdwell, 983 F.2d 1332 (5th Cir. 1993), "we decline to expand [this] phrase to encompass legal inability due to the filing of motions or requests." Id. at 1340-41. Thus, the Birdwell court ruled that where a continuance was not granted or moved for by either party, and neither could say a postponement was necessary, the charges should have been dismissed. And, while the Birdwell court noted that if a state objected to or was unprepared to respond to a defense motion, the trial court, sua sponte, or on the motion of the prosecution could grant a reasonable continuance, that such a continuance must be granted in open court with the defendant or his counsel present. Then, and only then, will the 120-day period be tolled. See also U.S. v. Roy,

830 F.2d 628 (7th Cir. 1987) (good cause must be shown in open court in order to insure that the delay does not work to the detriment of the substantial rights of the prisoner). Id. at 634.

There was no "open court" good cause for a delay shown here, other than Defendant Brocksmith's own demand for an immediate arraignment and trial setting on May 2, 1992. On that same day, the State made its own demand for trial within the 120-day time limit, acknowledging that the 120 days were about to run. The State further admitted that despite some pretrial motions by Mr. Brocksmith, it was ready to proceed to trial. Mr. Brocksmith did file a motion to dismiss the charges against him after he was finally brought back to Utah in the spring of 1992. But this did not delay the State nor cause them to be unable to proceed to trial. Thus, without requesting a continuance, or being granted one, the State's 120-day time limit to bring Defendant Brocksmith to trial began running no later than February 19, 1992 (the day he arrived in Utah), and ended on June 21, 1992. As authoritatively stated by the Utah Supreme Court in an analogous situation in State v. Shaw, 651 P.2d 115 (Utah 1982):

> When the trial court has not been asked to exercise the authority granted to it by the agreement for extending the time to bring the matter to trial, we find nothing in the agreement or in logic which would give us the authority to do so.
>
> The district attorney may not have willfully caused any delay in trying defendant, but as the Klimec court noted, at 206 A.2d 382, that is not a controlling issue nor is it a valid excuse for not complying with the statute.

> We find no merit in any philosophy that pays lip service to the principles of due process, speedy trial, and binding interstate compacts ... and then ignores those principles because their benefits were called upon by the very person whose interests were intended to be protected by them.

Id. at 120.

The State waited almost three years from the time of Defendant's first request for final disposition of the charges against him to bring him to trial, a period which included almost a one year wait after Defendant Brocksmith was finally back within the jurisdiction. This unconscionable delay is the very punishment that IAD was meant to prevent. The Act gives very little discretion to the trial court in this matter. Indeed, given the unquestioned delay of trial, the court had a duty to dismiss the charges against Defendant Brocksmith with prejudice. "If trial is not had on any indictment, information or complaint contemplated [in the act] prior to the prisoner's being returned to the original place of imprisonment ..., such indictment, information or complaint shall not be of any further force or effect, and the court shall enter an order dismissing the same with prejudice." See Utah Code Ann. § 77-29-5, Article IV(e) (emphasis added).

II

> THE COURT ERRED BY DENYING DEFENDANT'S MOTION TO WITHDRAW PLEA BASED ON DEFENDANT'S RIGHT TO A SPEEDY TRIAL UNDER SECTIONS 7 AND 24 OF ARTICLE I OF THE UTAH CONSTITUTION AND AMENDMENT 4 OF THE UNITED STATES CONSTITUTION.

Section 77-1-6 of the Utah Code Annotated states that a criminal defendant is entitled to be tried within 30 days of his

arraignment if the business of the court permits. Although this section is directory in nature, the Utah Court of Appeals, in State v. Hoyt, 806 P.2d 204 (Utah App. 1991), has confirmed that it provides guidelines for consideration of speedy trial issues:

> However, Section 77-1-6 is directory in nature, not mandatory ... . Nonetheless, a period of time between arrest and trial in excess of the statutory directive may well be a "triggering mechanism" for heightened scrutiny of a claim that the right to speedy trial was denied.

Id. at 207.

Heightened scrutiny requires that the Court consider factors such as the length of the delay, the reason for the delay, Defendant's assertions of his rights, and the prejudice to the Defendant. Barker v. Wingo, 407 U.S. 514, 530, 92 S.Ct. 2182, 2192, 33 L.Ed.2d 101 (1972). In this case, defendant was first held to answer in October 1989. Thereafter, the state obtained an ex parte dismissal of the charges on November 6, 1989, and then refiled those charges on December 21, 1989. Excluding the time between the latter two dates, over four years expired from when Defendant was first held to answer for these charges and the final disposition in January of 1993. Although the State may argue that this time period is not presumptively unconstitutional, it certainly demands inquiry into the Barker factors described above.

Under Barker, the Court must consider the reasons for the delay. In this case, there are several factors which contributed to the delay. Initially, the State refused to bring Defendant Brocksmith to trial on the first set of charges, notwithstanding

Defendant's desire to remain in Utah and face charges here. Shortly after Defendant was transferred to Illinois to face charges there, the State again filed charges against the Defendant. The State took no action to bring the Defendant to trial while he was facing Illinois state and federal charges. Nor did the State apply to the court for an extension of time in which to prosecute based upon the fact that the Defendant was on trial elsewhere. However, even excluding the time Defendant was facing state and federal charges in Illinois, the State failed to transport the Defendant to Utah for more than nine months after he was sentenced on federal charges in May 1991. Only 30 days of that time is attributable to Defendant and was based upon Defendant's understanding that his right to speed trial had already been violated.

Speedy trial time limits apply as much to prisoners incarcerated elsewhere as to those who are not. See State v. Peterson, 810 P.2d 421 (Utah 1991). Clearly, after August 26, 1991, there were no obstacles created by the Defendant or otherwise which would have prevented the State from bringing the Defendant before the court in Utah. Accordingly, the nearly 18 months that it took the State to bring Defendant to trial are previously attributable to the State.

Under Barker, the Court must next consider whether the Defendant asserted his right to speedy trial. The Defendant first requested a speedy disposition of the Utah charges against him in his memorandum to the District Judge dated November 5, 1989. That memorandum was received by the Court after the

Defendant had been transported to Illinois. However, it was filed in the District Court file and indicated Defendant's desire to obtain speedy disposition of Utah charges. Defendant then reiterated his request for speedy trial on February 7, 1990, March 15, 1991, April 15, 1991, April 26, 1991, and in his federal habeas corpus petition. There can be no doubt that Defendant made his request for speedy trial known.

It should also be noted that the State chose to request a dismissal of charges against the Defendant in November 1989 rather than afford Defendant a speedy trial at that time. This was based upon the fact that Defendant had chosen to plead not guilty to the charges. However, the State refiled charges against the Defendant only 45 days after obtaining a dismissal of the first set of charges, indicating that the State was prepared to go to trial at that time. The only change in the second information was to increase the degree of the communications fraud charges to first degree felonies and reduce their number to four. Based on these facts, it is reasonable to assume that the State could have proceeded to trial in December of 1989 and afforded the Defendant a speedy trial at that time.

Contrary to the State's representations, the Defendant was not informed of the State's decision to seek a dismissal of the charges. Had he been so informed, he would have objected. He had no opportunity to raise this issue as he was incarcerated and not brought before the Court for this hearing. A defendant is entitled to be present at all stages of the proceedings against him. State v. Aikers, 51 P.2d 1052 (Utah 1935). Further, as

stated in People v. Lichtenstein, 630 P.2d 70, 72 (Colo. 1981), the Court should consider the interests of the Defendant and society when entertaining a motion to dismiss:

> This provision parallels Federal Rule Crim. P. 48 (a) ... It is intended to give the court some supervisory power over the prosecution of a case so that the interests of justice, as well as the interest of the defendant and society, can be effected.

In addition, the reasons for a dismissal must be set forth in the order so that "... all might know what invoked the court's discretion and whether its action was justified." Salt Lake City v. Hanson, 425 P.2d 773 (Utah 1967). In the instant case, the order states that it is based on the State's motion, but does not contain the specific basis for the dismissal.

Although the State represented that Defendant's attorney did not object to dismissal of the charges, Brocksmith was not aware of that fact and Brocksmith's attorney denies receiving a copy of the Motion to Dismiss. This factor should be carefully considered in weighing whether Defendant's rights were violated.

Lastly, and contrary to cases under the Interstate Agreement on Detainers, the Court must consider whether the Defendant was prejudiced by the delay. In Barker, prejudice included pretrial incarceration, anxiety and concern of the accused, and impairment of defense. Certainly Defendant has experienced concern and anxiety over the status of his case in Utah, as evidenced by his continual requests for final disposition of his case, and his federal habeas corpus action. Brocksmith was unable to preserve and prepare his defense on Utah charges as he had been

and prepare his defense on Utah charges as he had been transferred to Illinois and did not have local counsel appointed who could have investigated factual issues surrounding his case which were related to his defense and were of concern to the Mr. Brocksmith. Had he been brought to trial prior to being transferred to Illinois, as was his desire, he would have had access to fresh evidence and current recollections by defense witnesses and his defense would not have been impaired. Defendant became subject to the possibility of consecutive sentencing, based upon his intervening conviction on federal charges--certainly an issue of high anxiety.

The State delayed in prosecuting these charges, the Defendant repeatedly requested speedy disposition of the charges, Defendant was not brought into the jurisdiction of this Court until over nine months after his sentencing on federal charges. Only 30 days of that time was attributable to the Defendant and Defendant was unable to obtain local counsel to assist him in preparing and preserving his defense. Accordingly, all the factors in Barker weigh in favor of the Defendant and the charges against him should be dismissed with prejudice.

III

THE DEFENDANT WAS DENIED DUE PROCESS AND EQUAL PROTECTION OF THE LAWS BY THE FAILURE OF THE STATE OF UTAH TO FOLLOW ITS OWN LAW AND PROCEDURES, INCLUDING A DENIAL OF ACCESS TO THE COURT.

It is axiomatic that the State must treat all citizens alike in its trial procedures. The United States Supreme Court has said:

> But no state is at liberty to impose upon one charged with crime a discrimination in its trial procedure which the constitution, and an act of congress passed pursuant to the constitution, alike forbid. Nor is this court to grant or withhold the benefits of equal protection, which the constitution commands for all, merely as we may deem the defendant innocent or guilty.

Eubanks v. Louisiana, 356 U.S. 584, 2 L.Ed.2d 991, 78 S.Ct. 970.

The State has committed multiple errors in not following its own procedure. Mr. Brocksmith was arrested on July 13, 1989. Contrary to the mandate of the United State Supreme Court as stated in County of Riverside v. McLaughlin, 111 S.Ct. 1661, no probable cause statement was filed. Thereafter, Defendant entered a plea of not guilty on October 19, 1989, and even though he was in custody, no trial date was fixed within 30 days as required by Utah Code Ann. § 77-1-6(1)(h) (1953). The Code requires:

> (1) In criminal prosecutions the defendant is entitled: ... (h) to be admitted to bail in accordance with provisions of law, or be entitled to a trial within 30 days after arraignment if unable to post bail and if the business of the court permits.

While it is true that subsection (1)(h) is directory in nature and not mandatory (State v. Hoyt, 806 P.2d 204 (Utah Ct. App. 1991)), yet when the defendant remains in custody, the obligation of the State increases proportionate to the length of time that incarceration continues.

Subsection (1)(a) likewise entitles the Defendant "... to appear in person and defend in person or by counsel." This right was also denied to Mr. Brocksmith when he was not permitted to be present when the court dismissed the first information on

November 6, 1989, nor when the court considered his claim for immediate disposition of charges against him on March 26, 1990. Arguably this constitutes a violation of Article I, Section 12 of the Utah Constitution.

Rule 25(c) of the Utah Rules of Criminal Procedure requires that the court must state the reasons for entering a dismissal of charges and enter the same in the minutes. This was not done on November 6, 1989. Defendant further is entitled to receive a copy of the accusation filed against him, but when the information was refiled on December 21, 1989, no copy of said information was sent to Mr. Brocksmith nor had he been furnished a copy of the information more than two years and two months later. This violates Utah Code Ann. § 77-1-6(1)(b).

One of the more critical violations by the State deals with a defendant's rights as an indigent person to be assigned counsel:

> Counsel shall be assigned to represent each indigent person who is under arrest for or charged with a crime in which there is a substantial probability that the penalty to be imposed is confinement in either jail or prison if:
>
> (a) The defendant requests it.

Utah Code Ann. § 77-32-2(1)(a) (1953). The Court has previously observed that this section is nothing more than a codification of the constitutional rights to assistance of counsel and self-representation as enunciated in State v. Lafferty, 749 P.2d 1239 (Utah 1988), affirmed 776 P.2d 631 (1989).

In this instance, Defendant requested counsel be appointed for him on three separate occasions. These requests occurred on

June 5, 1990, March 16, 1991, and April 30, 1991, and can be found or are referenced in the Court's own record on pages 183 and 165.

When the County Attorney moved ex parte to dismiss the first information against Mr. Brocksmith on November 6, 1989, he waited only 45 days to refile in the Circuit Court a new information alleging virtually the same offenses but increasing the severity of charges. The District Court was unaware that new charges had been filed in the Circuit Court and was therefore not disposed to act upon the ongoing motions and requests by Mr. Brocksmith. The silence by the County Attorney's Office prevented the District Court from fairly conveying the request for disposition made by Mr. Brocksmith to the appropriate court or responding to his request for counsel or to his request for a speedy trial. Such silence by the County Attorney's Office should not become a basis for an inappropriate circumventing of Mr. Brocksmith's constitutional rights.

The doctrines of res judicata and collateral estoppel have variously been applied to criminal matters. State v. Irwin, 101 Utah 365, 120 P.2d 285. On March 26, 1990, the District Court for the First Judicial District determined that the information filed in this case was dismissed and shall remain dismissed. On September 24, 1991, the United States District Court for the State of Utah found as a fact that: "... there are no charges pending against petitioner in the Utah courts at this time." This finding was based on the Utah District Court's finding on March 26, 1990, even though the District Court mistakenly

referred to the date of March 15, 1990. Mr. C. C. Horton, the same Deputy Attorney General for Utah who had filed the information in the Logan Circuit Court on December 21, 1989, was a party defendant to the action in the United States District Court. The State of Utah was likewise a party to the proceeding in the District Court in Cache County. Despite the State obviously being aware of the refiled charges, at no time did either the County Attorney's Office or any Utah Assistant Attorney disclose to either State or Federal District Court the true state of affairs regarding the refiled charges. Their collective conspiracy of silence created confusion for the two courts looking at the matter, and should not become a basis of reward given for the State's conduct. This information of the refiled charges, which was withheld from the courts, was directly contrary to the knowledge of the prosecutor who themselves had refiled the charges. Why no disclosure was made by the State's officers has not yet been made known to either the courts or the Defendant.

Inasmuch as the parties were identical in both instances, the issues having been contested by the Defendant and the courts in both cases having found that no information had in fact been filed in either court, res judicata and collateral estoppel arguably should have required dismissal of the charges with prejudice.

SUMMARY OF ARGUMENTS

The State of Utah breached its obligation to Mr. Brocksmith under Utah Code Ann. § 77-29-5, Articles 3, 4, and 5. Moreover,

United States Constitutions were violated by delays occasioned by the State. Multiple violations of equal protection and due process, coupled with the previous problems described herein, require the Court to remand the matter to the District Court for withdrawal of the guilty plea previously entered with instructions to thereafter dismiss the charges with prejudice.

Respectfully submitted this 15 day of April, 1994.

HERM OLSEN
Attorney for Defendant/Appellant

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foregoing APPELLANT JACK BROCKSMITH'S BRIEF was deposited in the United States mail to Joanne Slotnik, Assistant Attorney General, 236 State Capitol Building, Salt Lake City, UT 84114, this 15 day of April, 1994.

Herm Olsen

ADDENDUM

Exhibit 1	Motion to Withdraw Plea Under 77-13-6 and to Demand Dismissal With Prejudice for Violation of 77-29-5
Exhibit 2	Findings of Fact, Conclusions of Law, and Order Denying Defendant's Motion to Withdraw Plea
Exhibit 3	Memorandum Decision
Exhibit 4	Notice of Appeal

STATE OF UTAH

V

JACK BROCKSMITH

NO. 921000051

MOTION TO WITHDRAW PLEA UNDER 77-13-6 AND TO DEMAND DISMISSAL WITH PREJUDICE FOR VIOLATION OF 77-29-5

DEFENDANT ACTING UNDER 77-13-6 OF UTAH CODE MOVES THIS COURT TO ALLOW FOR the WITHDRAW OF HIS PLEA, AND FOR THIS CAUSE ARGUES THAT YET ANOTHER VIOLATION UNDER the INTERSTATE AGREEMENT COLDIFIED UNDER 77-29-5 EXCIST.

ABBRIVATED STATEMENT OF FACTS

1. DEFENDANT WAS BROUGHT TO THIS STATE UNDER the PROTECTION OF IAD IN WAS ARRAINED IN FEBUARY 1992.

2. DEFENDANT, THROUGH H... ATTORNEY SOUGHT to DISMISS all CHARGES FOR VIOLATION OF IAD FILD HIS REQUEST FOR SPEEDY TRIAL ON NOVEMBER 5, 19...

3. ALTHOUGH this MOTION WAS FILED IN FEBUARY 1992 IT WAS NOT HEARD TILL SEPTEMBER 30, 1992

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1993

872

4. This Court Ruled on October 5, 1992 and Held that all action taken by Defendant under the provision of IAD prior to June 1992 were void

5. On January 14, 1993 Defendent did enter a Plea Bargin and did plea guilty. He was sentenced the same day.

Notwithstanding the Court's finding of October 5, 1992 pertaining to Defendents Argument based on law and fact; As to the State of Utah casual Regard for the Interstate Agreement on Detainers, and the protection it affords a prisoner; the state once again strains the law.

To Wit:

The Plea Bargin Defendent entered into with good faith demanded his Expedious Return to F.C.I. Sandstone. Defendent did write the Court on are about 28 January 1993 and complained that he was still in Utah.

Now this Delay violots spirit of that Agreement is also opposit of IAD itself as colified under 79-29-5.

ARTICLE IV (e)
"AT the EARLIST PRACTICABLE TIME CONSONANT WITH the PURPOSE OF this AGREEMENT, the PRISONER SHALL BE RETURNED TO The SENDING STATE."

FURTHER it IS the UNDERSTANDING OF DEFENDENT THAT U.S. MARSHALLS HAVE BEEN CONTACTED, AND the RETURN MAY BE BASED ON their TIME FRAME

AGAIN UNDER IAD AS CODIFIED UNDER 77-29-5
ARTICLE IV (H)
"SHALL PAY all COST OF TRANSPORTING CARING FOR, KEEPING AND RETURNING the PRISONER."

CLEARLY the RETURN TO F.C.I. SANDSTONE OF this DEFENDENT IS the RESPONSIBILITY ONLY OF the STATE! THAT IS WHAT this COURT CHARGED THEM TO DO, AND the I.A.P. DEMANDS.

IT IS FOR This REASON THAT DEFENDENT WITHDRAWS HIS PLEA AND ONCE AGAIN MOVES THIS COURT TO DISMISS The CHARGES BASE ON THIS AND the OTHER ARGUMENTS given REGARDING

874

Speedy Trial and IAD.

In the event the Court denies this Motion, Defendant would appreciate in advance; that inasmuch he is in transit - the Court treat this as a Notice of Appeal.

Respectfully

Jack Brucksmith

Certificate of Service

A true copy of this was not possible due to fact Defendant could not pay cost of copies as required by Cash County Jail; therefor the County Attorney did not get a copy of this.

Respectfully

Jack Brucksmith

EXHIBIT "2" (page 1 of 4 pages)

LOGAN DISTRICT

FEB 11 3 07 PM '93

JAN GRAHAM - 1231
Attorney General
C. C. HORTON II - 1542
Assistant Attorney General
Attorneys for the State of Utah
236 State Capitol
Salt Lake City, Utah 84114
Telephone: (801) 538-1016

GARY O. McKEAN - 2201
Cache County Attorney
Attorney for the State of Utah
110 North 100 West
Logan, Utah 84321
Telephone: (801) 752-8920

IN THE FIRST JUDICIAL DISTRICT COURT OF CACHE COUNTY
STATE OF UTAH

STATE OF UTAH, Plaintiff, vs. JACK D. BROCKSMITH, Defendant.	FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER DENYING DEFENDANT'S MOTION TO WITHDRAW PLEA District Court No: 921000051 (Circuit Court No: 891001462)

This matter came before the Court upon the Defendant's pro se motion to withdraw plea. The matter was considered by the Court ex parte, at the request of the State, and having reviewed both the motion, the State's response to that motion, and the Court's file, the Court enters the following Findings of Fact and Conclusions of Law:

#69
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FINDINGS OF FACT

The Court finds that:

1. There was no condition of the plea negotiation nor any provision of the Judgment, Sentence and Commitment entered in this matter that imposed any specific deadline on the State for the transfer of the Defendant from the custody of the Cache County Jail to federal authorities, nor for the transportation of the Defendant to the Sandstone Federal Correctional Institution.

2. Defendant fails to show good cause for the withdrawal of his plea as required by §77-13-6(2)(a), Utah Code Annotated, 1953 as amended.

3. Defendant's motion improperly raises issues regarding allegations of violations of the Interstate Agreement on Detainers and his right to a speedy trial. Those matters had previously been appropriately and lawfully considered by this Court, and the Defense motions with respect to those issues were lawfully denied.

4. The Defendant, in fact, was transferred from the Cache County Jail to federal authorities, and transported in the custody of the Federal Authorities, on February 5, 1993, four (4) days before the Defendant's Motion to Withdraw was actually filed.

CONCLUSIONS OF LAW

1. The Defendant's Motion to Withdraw Plea is inadequate and fails to meet the criteria required by §77-13-6(2)(a), Utah Code Annotated, 1953 as amended.

2. Because of the Defendant's transfer and transportation from the Cache County Jail prior to the filing of his motion, the motion is moot.

3. The Defendant fails to state any basis upon which the relief requested may be granted, and therefore the Motion to Withdraw should be denied.

ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law, the Court has considered the matter ex parte, at the request of the State, including a review of the Defendant's motion, the State's response to that motion, and the Court's file.

Therefore, it is hereby ordered that the Defendant's Motion to Withdraw Plea is hereby denied.

DATED this 9th day of February, 1993.

BY THE COURT:

GORDON J. LOW
District Judge

CERTIFICATE OF DELIVERY

I hereby certify that a true and correct copy of the proposed foregoing Findings of Fact, Conclusions of Law, and Order Denying Defendant's Motion to Withdraw was delivered this date to Arden Lauritzen, Co-Counsel for Defendant, Barbara King Lachmar, Co-Counsel for Defendant, at their respective mailboxes at the District Court.

DATED this 11th day of February, 1993.

Crystal A. Gammon
Legal Assistant

CERTIFICATE OF MAILING

I hereby certify that I mailed a true and correct copy of the foregoing Findings of Fact, Conclusions of Law and Order Denying Defendant's Motion to Withdraw Plea to Jack Brocksmith, Defendant, at Sandstone Federal Correctional Institution, Sandstone, MN 55072.

DATED this 11th day of February, 1993.

Crystal A. Gammon
Legal Assistant

EXHIBIT "3" (page 1 of 3 pages)

IN THE FIRST JUDICIAL DISTRICT COURT, COUNTY OF CACHE
STATE OF UTAH

STATE OF UTAH, Plaintiff vs. JACK D. BROCKSMITH, Defendant	MEMORANDUM DECISION CASE NO. 921000051

THIS MATTER IS BEFORE the Court upon the Defendant's Motion for Leave to Withdraw his plea. The Motion is supported by an Affidavit received the 26th day of February 1993. The Court having reviewed the pleadings in this matter, together with the Affidavit, being cognizant of the circumstance surrounding the entry of the plea and being aware of the plea negotiation, it would appear that the State did act expeditiously in this matter, that the Defendant was turned over to the federal authorities in a timely fashion, that transportation was provided by said federal authorities and was out of the hands and control of the State. No appropriate relief could be provided by granting the Motion. For the above reason and those stated in the State's Response the Motion is denied.

921-51

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MICRO FILMED

DATE: 3-26-93

ROLL NUMBER: #35

Counsel for the State is directed to prepare a formal Order in conformance herewith.

Dated this 24 day of March, 1993.

BY THE COURT

Gordon J. Low
District Court Judge

CERTIFICATE OF MAILING

I HEREBY CERTIFY THAT I MAILED A TRUE AND CORRECT COPY OF THE ATTACHED NOTICE, BY FIRST CLASS MAIL, POSTAGE PREPAID, TO THE FOLLOWING:

GARY O. MCKEAN
ATTORNEY FOR PLAINTIFF
110 NORTH 100 WEST
LOGAN UT 84321

BARBARA LACHMAR
ATTORNEY FOR DEFENDANT
POST OFFICE BOX 4432
LOGAN UT 84321

DATED THIS 24 DAY OF March 1993

/s/ LOIS R. DANKS
Deputy Clerk

ARDEN LAURITZEN
610 NORTH MAIN STREET
PO BOX 171
LOGAN, UT 84321

EXHIBIT "4" (page 1 of 4 pages)

IN THE
FIRST JUDICIAL DISTRICT COURT OF CACHE COUNTY
STATE OF UTAH

JACK D. BROCKSMITH, Defendant, v STATE OF UTAH, Plaintiff.	District Court No. 921000051 (Circuit Court No. 891001462)

NOTICE OF APPEAL

NOW COMES Defendant, Jack D. Brocksmith, in pro se, and appeals to the Supreme Court of the State of Utah and/or the Utah Court of Appeals from the Judgment Order entered January 14, 1993.

This is not a Notice of Appeal regarding the Defendant's Motion to Withdraw His Plea Bargain.

It is in fact an appeal that addresses itself to the more fundamental question of jurisdiction. The Court will recall that this issue was raised by the Defendant in his pro se Motion to Dismiss, filed in March, 1990. It was raised again by his court-appointed counsel in February, 1992, and denied on October 5, 1992.

Through his court-appointed counsel, Defendant petitioned the Supreme Court with an interlocutory appeal. The Supreme Court refused to hear this Motion.

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In a narrow set of circumstances, immediate appeal of a pretrial judgment is available. The Supreme Court articulated an exception to the final judgment rule as follows:

> "Finally determining claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." (Cotten v Beneficial Industrial Loan Corp., 337 U.S. 541 (1949)

In a criminal case, "The collateral order doctrine" allows appeal from a judgment that: (1) Conclusively determines the disputed issue; (2) Is completely separate from the issue of the defendant's guilt; and (3) Is effectively unreviewable on appeal from a final judgment." (Abney v United States, 431 U.S. 651, 659-63 [1977])

The Supreme Court's option not to act on Defendant's interlocutory appeal should not hamper its duty to hear it now. The right of speedy trial is a constitutional issue that is fundamental to the ends of justice.

The Defendant was asking with his Motion to dismiss in 1990; the more formal motion filed in February 1992 asked that the First District Court make legal precedent. This clearly first impression case has merit for not only this Defendant, but for Utah case law that is nearly silent on the Interstate Agreement on Detainers. The First District Court may have no mandate to create law, but the Appeals Court of Utah does have not only that commission, but that responsibility.

In November 1991 Defendant did file a 42 U.S.C. 1983 Action in the United States District Court, Case 91-C-1245W, regarding his constitutional rights as to search and seizure and speedy trial as interpreted by present Utah law. This case is still pending.

His guilty plea of January 14, 1993, not withstanding his waiver of his nonjurisdictional constitutional rights must be understood in its proper context. He had been in the Cache County Jail for nearly a year. He was facing a potential five to life sentence for communication fraud - a law that is,to say the least, constitionally vague. What he was in reality guilty of was misappropriation, but no such criminal law exists in the state of Utah. The state was going to recommend consecutive sentencing on the charges. The Defendant is fifty-four years of age, and his health is failing. After conferring with his children, he did what any reasonable person would do.

This appeal is not to refute the plea agreement, but whether or not the First District Court as mandated by the Interstate Agreement on Detainers and the Sixth Amendment was in fact without jurisdiction. A constitutional issue of such magnitude deserves the review of a higher court, and should not be considered a violation of the plea agreement.

Conclusion

WHEREFORE, Defendant prays this Honorable Court will grant an appeal of this case, appoint counsel to pre-

pare Defendant's appeal, and such other relief as this Court deems just and proper.

Respectfully submitted,

Dated this 28TH day of FEB, 1993

Jack D. Brocksmith
08773-026-B
PO Box 1000
Sandstone MN 55072

CERTIFICATE OF SERVICE

On this date, I, the undersigned, do hereby swear and affirm under penalty of perjury that I did deposit in the United States mail receptacle at the Federal Correctional Institution, Sandstone, Minnesota, with sufficient first class postage, a true and correct copy of NOTICE OF APPEAL, addressed to: Gary O. McKean, Cache County Attorney, Attorney for the State of Utah, 110 North 100 West, Logan, Utah 84321; and to the Supreme Court of the State of Utah, State Capitol, Salt Lake City, Utah 84114.

Dated this 28TH day of FEB, 1993

Jack D. Brocksmith
08773-026-B
PO Box 1000
Sandstone MN 55072